

DEBEVOISE & PLIMPTON

DOCKET FILE COPY ORIGINAL

555 13TH STREET, N.W.
WASHINGTON, DC 20004
(202) 383-8000

875 THIRD AVENUE
NEW YORK, NY 10022
TELEPHONE: (212) 909-6000
FAX: (212) 909-6836

21 AVENUE GEORGE V
75008 PARIS
TELEPHONE: (33 1) 40 73 12 12
FAX: (33 1) 47 20 50 82

TOWER 42
INTERNATIONAL FINANCIAL CENTRE
OLD BROAD STREET
LONDON EC2N 1HQ
TELEPHONE: (44 20) 7786 9000
FAX: (44 20) 7588 4180

FAX: (202) 383-8118
WWW.DEBEVOISE.COM

13/F ENTERTAINMENT BUILDING
30 QUEEN'S ROAD CENTRAL
HONG KONG
TELEPHONE: (852) 2160 9800
FAX: (852) 2810 9828

March 19, 2001
BOLSHOI PALASHEVSKY PER. 13/2
MOSCOW 103104
TELEPHONE: (7-503) 956-3858
FAX: (7-503) 956-3868

Ms. Magalie R. Salas
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

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MAR 19 2001

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

**Re: CS Docket No. 01-7/(Nondiscrimination in the Distribution of
Interactive Television Services over Cable)**

Enclosed please find for filing an original and nine (9) copies of the
comments of the National Football League in the above-captioned proceeding.

Respectfully Submitted,

Rebecca Tushnet
Rebecca Tushnet

Enclosures

at 9

Before the
Federal Communications Commission
Washington, D.C. 20554

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MAR 19 2001

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

In the Matter of)
)
Nondiscrimination in the Distribution of)
Interactive Television Services Over Cable)
)

CS Docket No. 01-7 /

COMMENTS OF THE NATIONAL FOOTBALL LEAGUE

The National Football League ("NFL") submits these comments in response to the Commission's Notice of Inquiry, FCC 01-7 (released January 18, 2001) ("Notice"). The NFL has thirty-one Member Clubs, whose pre-, post and regular season games are televised from August through the end of January, providing the American public with a significant amount of the most highly-rated and popular sports programming in the country. Most of that programming appears on free over-the-air television in broadcast markets throughout the country, although one game per week is available over the ESPN national cable network. (Even this game is aired on free over-the-air television in the home markets of the participating clubs.) Moreover, since 1994, the NFL has offered satellite television subscribers the ability to subscribe to "NFL Sunday Ticket," which allows them to receive broadcasts of all Sunday afternoon NFL games, wherever the subscriber is located (subject to local blackouts of non-sold-out games). In addition, the NFL or its Member Clubs license content to other television programs, such as HBO's *Inside the NFL* and the local *Redskins All Access* program on WRC (Channel 4 in the

Washington, D.C. area). As a result, the NFL and its Member Clubs have a keen interest in the future of television in the United States, including “interactive television” (“ITV”), the subject of this proceeding.

As the ITV market and services evolve, the NFL anticipates that it will take full advantage of the new technology, whether with its existing or future broadcast partners, or on its own. Although the NFL does not directly provide ITV services at this time, it has allowed its broadcast partners to experiment with “enhanced” game telecasts.¹ Full-fledged ITV services undoubtedly will be available in the future. Plans for ITV-delivered services might include the development of NFL-related content that could be integrated with particular televised football games or other shows. In this regard, we agree with the Commission’s assessment that sports programming can provide a fertile source of material for ITV streams associated with program content. Notice at ¶¶ 6, 15.

The NFL has three points to make in these comments. First, as an owner of program content, we believe that the development of a vigorous market for ITV services is beneficial for both the public and the NFL. At this point, because the ITV market is, at most, nascent, it would be premature for the Commission to determine that the best way to foster its growth is through regulation. Over time, the ITV market will evolve, but it

¹ For the past two seasons, the NFL has entered into agreements to allow ABC to “enhance” *Monday Night Football* with interactive elements accessible over the Internet, allowing viewers to participate in online polls and quizzes, and receive extra information about players, teams, and coaches. This pioneering Internet-telecast linkage currently requires two separate screens, a computer and a television, but the NFL expects that similar enhancements may be used in future one-screen ITV initiatives.

should do so based on consumer desires, available technologies and the rights and business plans of content owners. At present, therefore, we believe that the Commission should not propose or adopt a regulatory framework for this evolving market sector.

As this nascent market and related technologies evolve, we believe the answer to the principal question raised by the Notice -- whether cable operators or other platform providers should be subject to a nondiscrimination rule with respect to ITV service providers -- will become apparent. As it does, if and to the extent needed, the Commission can then craft a sensible regulatory framework for ITV services, bearing in mind the key principles discussed below.²

Second, should the Commission initiate a rulemaking proceeding (whether now or in the future), it is critical that none of the proposed rules interfere with the rights of content owners. The NFL, like other content owners, owns valuable copyrights sports programming, and with its Member Clubs and its affiliates (such as NFL Films) also owns trademarks and other intellectual property in the names of sporting events (such as the Super Bowl[®] game), the names of the Member Clubs, logos, uniforms, and an extensive video library dating back to the 1920s. These rights are subject to protection and exploitation by the content owner through private agreements under the umbrella of protection provided by federal and state intellectual property and contract laws. In the world of ITV, we anticipate that we would continue to use contracts to protect and exploit

² In this context, it should be noted that the NFL is not affiliated with any ITV providers or platform providers within the meaning of the Commission's rules.

our intellectual property rights to promote the development of program-related ITV services.

In this regard, the Commission should make crystal clear that its goals and intentions, and any rules that it might adopt, in no way affect the ability of content owners to use intellectual property laws and private agreements to protect and exploit their content. As ITV services have yet to develop fully, the extent to which valuable intellectual property rights might be infringed by the unauthorized modification of content through interactivity initiated or encouraged by service providers or users, or by the juxtaposition of video signal and ITV enhancements, remains unknown. By way of example, if ITV service providers, other than as authorized by the NFL, associate their ITV content with NFL telecasts,³ the NFL's ability to control its trademarks and to prevent false associations, and its ability to use its copyrighted video assets in ITV products that will benefit its fans, plainly would be adversely affected.

In short, any obligations not to discriminate, or to require platform providers to carry certain ITV service providers, should not impair the ability of content owners to pursue all rights and remedies with respect to preserving their intellectual property. In this regard, content owners should be able to enter into contracts to ensure that ITV

³ The Notice describes, for example, a hypothetical service offering online sales of collectible baseball cards linked to Major League Baseball telecasts, but not associated with Major League Baseball. *See* Notice at ¶ 15. In this regard, any rulemaking should leave untouched the ability of content owners to exercise their rights against any unauthorized e-commerce sale or association with telecasts in which they have intellectual property rights.

services will not undercut intellectual property. In the case of the NFL, for example, private agreements might be used to prevent ITV services from creating (and platform providers from carrying) program-related material around the Super Bowl® and other game telecasts that is inconsistent with the exploitation of our intellectual property, whether by promoting a competitive e-commerce site, diverting viewers' attention from the game, or featuring sponsors or advertisers who compete with companies that have paid to advertise during the game.⁴

Third, content owners should be able to contract with platform providers (including cable operators), broadcasters, or other distributors for the exclusive rights to integrate program-related ITV content related to telecasts -- including the insertion of codes into the programming stream to facilitate interactivity and e-commerce -- to position their programming howsoever they may choose and to promote ITV streams authorized by the content owner when a viewer is watching a simultaneous telecast program. Exclusivity is well-established in the television industry and may be desirable or even necessary as a business model, particularly in an emerging market. Content owners enjoy the exclusive rights to license or otherwise exploit their intellectual property. The NFL and its Member Clubs today license certain of their intellectual

⁴ Obviously, any erosion in advertiser support that might result from such ITV "ambush advertising" would undermine the NFL's ability to continue to rely on free over-the-air television as the principal means of distributing NFL games.

property (such as television programs) on the basis of exclusivity.⁵ Such exclusive arrangements both encourage investment in and use of new technologies, and diminish the likelihood that viewers might be confused with respect to the source, sponsorship, or affiliation of particular ITV programs.

In this regard, the NFL emphasizes that any further proceedings by the Commission should clearly distinguish among (1) the “pipeline” or distribution platforms by which ITV services may be delivered, (2) the ITV services themselves and (3) the program-related content provided by the ITV services. The Notice itself does not clearly distinguish between “ITV services” and the content that might be packaged, with or without the consent of the content owner, by a provider of such services. To the extent that the ITV service provider also is the broadcaster or network to which the content owner has licensed its program content, the need for such a distinction may be less evident, although, even here, it is quite possible that the rights to distribute the content on

⁵ The Notice recognizes that a video programmer could contract with an ITV service, and that contracts between such programmer and the service provider might be exclusive or non-exclusive. *See* Notice at ¶ 14. Where the content owner has negotiated for an exclusive relationship with the programmer, then the content owner should not be prohibited from having an exclusive relationship with the ITV service provider. Similarly, neither should an exclusive relationship between the service provider and the programmer be precluded. As noted, it is too early in the day to answer such questions as to whether and to what extent ITV enhancements might be negotiated between the video programming provider and the cable system, *see* Notice at ¶ 17, given that such negotiations might also be governed by contracts with content owners.

the video stream are negotiated separately (and with another entity) from the content that constitutes the ITV enhancements.⁶

Even if the Commission should conclude that the adoption of nondiscrimination rules might be appropriate for the distribution platform itself, content owners should be able to control the manner, timing and format by which their content is presented by ITV service providers, whether integrated with or separately from video programs. Nothing in any rules should disturb the freedom of content owners to negotiate private arrangements by which, under the law, they are rightfully able to exercise such control.

Respectfully submitted,

National Football League

By Jeffrey P. Cunard (RUC)
Jeffrey P. Cunard
DEBEVOISE & PLIMPTON
555 13th St., N.W., Suite 1100E
Washington, D.C. 20004
(202) 383-8000

Counsel for the National Football
League

Dated: March 19, 2001

⁶ See *id.* (noting that the Web sites can be independent from the video programmer).